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No. 76-253

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOREN BERGH, PETITIONER

v.

STATE OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-28) is reported at 535 F. 2d 505. The order of the district court denying petitioner's motion for summary judgment and granting respondents' motions to dismiss (Pet. App. 23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1976, and a petition for rehearing was denied on May 27, 1976 (Pet. App. 24). The petition for a writ of certiorari was filed on August 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly refused to enjoin a judge and clerk of the district court from proceeding further in a civil action to which petitioner was not a party.

STATEMENT

In September 1970, the United States brought suit against the State of Washington and its Department of Fisheries to enforce compliance with certain treaties between the federal government and various Indian tribes in western Washington. The case was assigned to respondent George Boldt, United States District Judge for the Western District of Washington, who held, in an exhaustive 100-page opinion, that the State could not apply its existing fishing regulations to members of the Indian tribes covered by the federal treaties except as necessary for conservation. *United States* v. *State of Washington,* 384 F. Supp. 312 (W.D. Wash.). This decision was affirmed by the court of appeals (520 F. 2d 676 (C.A. 9)), and this Court denied review (423 U.S. 1086). The Washington Reef Net Owners Association and the Northwest Steelheaders Council of Trout Unlimited participated as parties in the case, while the Washington State Sportsmen's Council, Inc. participated as *amicus curiae.*

Petitioner, a commercial fisherman duly licensed by the State of Washington, did not seek to intervene as a party or to participate as *amicus* at any stage of the litigation in *United States* v. *State of Washington.* Instead, he instituted this action seeking declaratory and injunctive relief against Judge Boldt, Edgar Scofield, Clerk of the United States District Court for the Western District of Washington, the State of Washington and its Department of Fisheries, and Thor Tollefson, the department director, to prevent the judge from ordering the State

to promulgate regulations favoring Indian fishermen, the clerk from filing any such order, and the State and its agents from adopting or enforcing such regulations. Petitioner contended that the regulations drafted in response to Judge Boldt's decision would give Indian fishermen greater rights than non-Indian fishermen and that this would constitute unlawful racial discrimination, in violation of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. 1983, and the Fourteenth Amendment.

The district court dismissed the complaint, holding that the action was "a collateral attack upon the judgment rendered by the Honorable George Boldt in *United States* v. *State of Washington* * * * and is an impermissible attempt to relitigate issues already litigated and ruled upon in that action" (Pet. App. 23). The court of appeals affirmed *per curiam,* agreeing that the relief sought was unwarranted under the circumstances, that the injunction against Judge Boldt and Clerk Scofield was properly denied as an attempt by petitioner "to affect the disposition of an action to which he is not a party," and that petitioner's proper recourse was to move to intervene in the continuing litigation before Judge Boldt (Pet. App. 27).

ARGUMENT

The court of appeals correctly refused to enjoin Judge Boldt and his court clerk from proceeding further in *United States* v. *State of Washington.* As the court noted (Pet. App. 26), injunctions that would interfere with the conduct of another federal proceeding "should be granted only in the most unusual cases." See *United States* v. *American Radiator & Standard Sanitary Corp.,* 388 F. 2d 201, 203-204 (C.A. 3), certiorari denied, 390 U.S. 922. There was no necessity for such extraordinary relief here. Not only could petitioner have

moved to intervene in the litigation before Judge Boldt if he believed that his rights might have been affected by a ruling in that case, but also a challenge to the validity of Judge Boldt's order requiring the promulgation of specific regulations designed to implement the decision in *United States* v. *State of Washington* is presently pending in the Ninth Circuit (Nos. 75-2835 and 76-1042). Petitioner's proper remedy is to seek to participate in that proceeding. See Fed. R. App. P. 29.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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